

L.P. and Carvalho v. Portugal (applications nos. 24845/13 and 49103/15), European Court of Human Rights, 8 October 2019.

Member State



Topic

Freedom of expression, freedom of the media, criminalisation of insult and defamation

Deciding Court Original Language

L.P. and Carvalho v. Portugal (applications nos. 24845/13 and 49103/15), European Court of Human Rights, 8 October 2019.

Deciding Court English translation

L.P.:

- High Judiciary Council (Conselho Superior de Magistratura), 20 May 2008
- Lisbon Court, 24 January 2012
- Lisbon Court of Appeal, 4 December 2012
- Supreme Court of Justice, 4 June 2013

Carvalho:

- Felgueiras Court, proc. n.º 21/06.0GAFLG
- Oporto's Court, proc. n.º 6/09.4TRGMR
- Felgueiras Court, proc. n.º 589/11.9TVPRT

Date Decision

8 October 2019

EU legal sources and CJEU jurisprudence

- Article 19 ICCPR
- General Comment 34, UN Human Rights Committee
- Article 10 ECHR
- Article 11 of the Charter

ECtHR Jurisprudence

ECtHR found there was a violation of **freedom of expression** in all the below-mentioned cases against Portugal:

- Lopes Gomes da Silva c. Portugal, 28 September 2000
- Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal, 26 April 2007
- Campos Dâmaso v. Portugal and Laranjeira Marques da Silva v. Portugal, 24 April 2008 and 19 January 2010.
- Público – Comunicação Social, S.A. and Others v. Portugal, of 7 December 2010
- Conceição Letria v. Portugal, 12 of April 2011
- Pinto Coelho v. Portugal, 22 March of 2016
- Antunes Emídio v. Portugal and Soares Gomes da Cruz v. Portugal, 24 September 2019
- Pais Pires de Lima v. Portugal, 12 February 2019

Pais Pires de Lima v. Portugal, as in L.P. and Carvalho v. Portugal concerned a complaint following a civil judgement ordering a lawyer to pay damages to a judge whose personal and professional honour and reputation he had attacked.

Apart from Antunes Emídio v. Portugal and Soares Gomes da Cruz v. Portugal - that concerns both a journalist and a doctor - all the other cases mentioned above followed national civil and/or criminal judgements against journalists.

The ECtHR has not explicitly excluded the possibility of maintaining **criminal defamation laws**. However, it has criticised the usage of such laws on numerous occasions. The ECtHR has suggested that the imposition of a criminal sanction alone may be sufficient for the finding of a disproportionate remedy and, therefore, a violation of Article 10 of the ECHR.

Jurisprudence cited explicitly by the ECtHR in L.P. and Carvalho v. Portugal

- on the need for interference "in a democratic society":

Handyside v. The United Kingdom, 7 December 1976 (Series A no.24), and which it recalled in Morice v. France ([GC], no.29369 / 10, §§ 124 to 127, ECHR 2015). For the principles relating to the freedom of expression of lawyers, Morice judgment, (cited above, §§ 132 to 139) and to the Gouveia Gomes Fernandes and Freitas e Costa v. Portugal (no.1529 / 08, § 46, 29 March 2011). Finally, given that, in the present cases, the measures in question were aimed at the protection of

"the reputation and the rights of others", the ECtHR refers to the principles governing the balance between the freedom of expression guaranteed by the Article 10 of the Convention and, on the other hand, the right to respect for private life enshrined in Article 8, which it recently recalled in the *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* ([GC], no 17224/11, § 77, 27 June 2017);

- On the alleged damage to the alleged reputation of the judge in L.P

Since these accusations were transmitted only to the High Judiciary Council - and therefore not made public-, these would be either way very limited, *mutatis mutandis*: *Bezmyanny v. Russia*, no 10941 / 03, § 42, April 8, 2010);

- On the severity of the sanctions applied

Likely to produce a dissuasive effect for the legal profession as a whole, in particular when it comes to lawyers defending the interests of their clients (see, *mutatis mutandis*, *Gouveia Gomes Fernandes and Freitas e Costa*, cited above, § 54, and *Erdener v. Turkey*, no 23497/05, § 39, 2 February 2016).

Subject Matter

Freedom of expression; freedom of the media; criminalization of defamation

Legal issue(s)

The case concerned findings of liability against two lawyers for defamation (L.P.) and for attacking a person's honour (Mr. Carvalho) in respect of two judges, on account of documents drawn up by the lawyers in their capacity as representatives.

Request for expedited/PPU procedures

Not applicable.

Interim Relief

Not applicable.

National Law Sources

- Articles 180 § 1 and 184 of the Criminal Code
 - Article 483 of the Civil Code
 - Article 8 § 2 a), b), d) and g) of the Statue of the Bar Association
 - Article 8 § 2 and article 26 § 1 of the Constitution
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Facts of the case

The applicants, L.P. and Pedro Miguel Carvalho, are two Portuguese lawyers.

In 2008 L.P. sent a letter to the High Council of the Judiciary (HCJ) to complain about the conduct of Judge A.A. during a preliminary hearing and about certain procedural irregularities. In particular, he stated that he had noticed “an atmosphere of great familiarity between the judge and defence counsel”. The HCJ decided to take no action on the complaint. Judge A.A. subsequently lodged a complaint for defamation against L.P., alleging an attack on her reputation and honour. By a judgment of January 24, 2012, the Lisbon court found the applicant guilty of aggravated defamation and sentenced him to a thirty day fine at the daily rate of ten euros, i.e. 300 EUR, and payment of the sum of 750 EUR to the judge. AA for the moral prejudice suffered by it. In 2012 the Lisbon Court of Appeal ordered L.P. to pay 5,000 euros (EUR) to the judge, finding that the accusations made against her had overstepped the bounds of permissible criticism. L.P.’s appeals against that decision (including before the Supreme Court) were unsuccessful.

In 2009 two persons of Roma origin, represented by Mr Carvalho, lodged complaints against Judge A.F. for defamation and racial discrimination on account of comments made by her in a judgment concerning them. After the case had been discontinued by the public prosecutor the same two persons, again represented by Mr Carvalho, brought a private prosecution for defamation, claiming EUR 10,000 from the judge. This complaint was declared manifestly unfounded by the Guimarães Court of Appeal. In 2011 the judge brought a civil action against Mr Carvalho, arguing that in his capacity as representative he had knowingly lodged an unfounded criminal complaint against her. Mr Carvalho was ordered to pay EUR 10,000 with default interest.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Court noted that the decisions finding the applicants liable had constituted interference with the exercise of their freedom of expression. The interference had pursued two legitimate aims: (1) protecting the reputation and rights of others and protecting judges; and (2) maintaining the authority and impartiality of the judiciary.

Nevertheless, the Court considered that the reasons given by the domestic courts to justify finding the applicants liable had been neither relevant nor sufficient and had not corresponded to a pressing social need. The interference had thus been disproportionate and had not been necessary in a democratic society. In its reasoning, the Court made the following observations.

Both applicants had been acting in the performance of their professional duties as lawyers. L.P.’s complaint to the HCJ had described the conduct of a preliminary hearing attended by him in his capacity as a representative and had drawn the HCJ’s attention to situations he considered abnormal, with the aim of defending his client’s interests. The criminal complaint and the private prosecution drawn up by Mr Carvalho had been aimed at prosecuting a judge for defamation and discrimination following allegations she had made against some of Mr Carvalho’s clients in a judgment convicting them.

L.P.’s accusations had been criticisms of the kind that judges could expect to receive in the course of their duties, without their honour or reputation being damaged as a result. The accusations had not overstepped the bounds of permissible criticism; they had been sent to the HCJ alone and had not been made public. Hence, the alleged damage to the judge’s reputation had been very limited. The case against Mr Carvalho concerned the fact that he had taken instructions from clients seeking to prosecute a judge for defamation and discrimination, following criminal proceedings

which had received widespread media coverage owing to a judgment given by the judge in question against Mr Carvalho's clients. However, the prosecution had not been successful. The Court considered that Mr Carvalho had simply defended his client's interests and did not see how he had failed to observe professional ethics. Furthermore, the Court took the view that seeking to compel a lawyer to refuse instructions was liable to infringe the right of everyone to have access to a court.

As to the severity of the penalties the Court found that, although the fine imposed on L.P. was small and his conviction did not give rise to a criminal record, the imposition of a criminal sanction had a chilling effect on the exercise of freedom of expression. This was more unacceptable in the case of a lawyer who was required to ensure the effective defence of his clients. Furthermore, the applicants in both cases had been ordered to pay significant sums in damages to the judges concerned (EUR 5,000 in L.P.'s case and EUR 10,000 in the case of Mr Carvalho). Hence, the penalties imposed had not struck the requisite fair balance between the need to safeguard the judges' right to protection of their honour and the authority of the judiciary, on the one hand, and the applicants' freedom of expression on the other. They had also been apt to have a chilling effect on the profession of lawyer, especially with regard to lawyers' defence of their clients' interests.

The Court therefore held that there had been a violation of Article 10 of the Convention.

Relation of the case to the EU Charter

- Article 11 of the Charter
 - References to the Charter in the national cases (vertical interaction) is ad abundantiam; of ornamental value only.
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Relation between the EU Charter and ECHR

National courts are increasingly interpreting freedom of expression and criminal code provisions on defamation according to ECtHR decisions, citing ECHR case law, but also a number of other national court decisions and the Charter. For example, in Lisbon Court of Appeal proc. n.º 60/09.9TCFUN.L1-2, 21 January 2016:

- (...) it is inferred from Supreme Court ruling of 06.30.2011 (Pº 1272 / 04.7TBBCL-G1.S1), (...) that the interpreter will have to follow the consistent path, not from the protection of the right to honor (...) but from the right to free expression, and to ascertain whether any of the exceptions of paragraph 2 of the aforementioned Article 10 of the ECHR take place, a path that I came out reinforced by the text of the Charter of Fundamental Rights of the European Union, which, in its article 11, also enshrines freedom of expression and information."

Similarly, Évora's Court of Appeal decision, proc. n.º 80-16.7GGBJA.E1, 23 January, 2018:

- "freedom of expression is one of the foundations of democratic states, protected by the European Charter and the European Court of Human Rights." – Tribunal da Relação do Porto/Oporto's Court of Appeal, 31 October 2007, proc. n.º 064468
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Use of Judicial Interaction technique(s)

Consistent interpretation

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

Specifically on the use of judicial interaction techniques, Évora's Court of Appeal decision, proc. n.º 80-16.7GGBJA.E1, 23 January, 2018 cites Supreme Court Judge Henrique Gaspar:

- “The relationships of mutual influence between the ECHR and national courts are woven into a model that is not procedural in nature, whether hierarchical or normative. (...) The relationship that exists may eventually fall into a category of “semi-vertical” judicial dialogue (...)”

The same judgment cites, not only ECtHR's case law but also a number of national court decisions, at least one of them alluding explicitly to the Charter:

- “freedom of expression is one of the foundations of democratic states, protected by the European Charter and the European Court of Human Rights.” – Tribunal da Relação do Porto/Oporto's Court of Appeal, 31 October 2007, proc. n.º 064468

However - even in decisions where ECtHR's reading of article 10 is embraced by national courts -, it is not always done so unambiguously. For example, Supremo Tribunal de Justiça/Supreme Court, proc. n.º 2175/11.4 TDLSB.L1.S1, 6 September 2018 concluded, inter alia, that:

- (...) “considering the ECHR is not an imposition, rather an intellectual imperative, implying an analysis and ponderation, that can result in acceptance but, also, dissonance.”
- (...) “there are certain areas of higher permeability [at the national level] to ECtHR's jurisprudence, therefore, in those cases, there is a justification to use them as a reference.” – quoting Supremo Tribunal de Justiça/Supreme Court, proc. n.º 1454/09.5TVLSB.L1.S1, 31 January 2017.
- This is the case of ECtHR jurisprudence on freedom of expression, interpreting article 10.º of the ECHR, that offers useful and relevant criteria to national courts, that are an integral part of a European consensus, national decisions must not disregard.
- Such consensus reveals a doctrine of reinforced protection of freedom of expression, in the terms previously mentioned, being considered a super freedom” (...)
- [complementary, it should be noted that] “The tendency to decriminalize defamation is not absolute but at least relevant.”

Strategic use of judicial interaction technique (purpose aimed by the national court)

Not applicable

Impact on Legislation / Policy

As described above, numerous judgments of the European Court of Human Rights have pointed to

violations of freedom of expression concerning journalists. In addition, the Council of Europe Platform to promote the protection of journalism and safety of journalists registered three recent alerts for Portugal.

Overall, basic standards on freedom of the media are considered to be well established. Due to the standards imposed by the revised Audiovisual Media Services Directive (AVMSD) the regulatory authority for the media (ERC) has recently acquired new competences and strengthened its interaction with other media stakeholders. ERC has discussed the need to update the legal framework in the context of its participation in the meetings of the recently created Advisory Council of Journalism - 2021's Country Chapter on the rule of law situation in Portugal.

As to the legal framework on insult and defamation - these are still punishable with imprisonment. The latter has been noted by 2020's Country Chapter on the rule of law situation in Portugal. Under certain qualifying circumstances, those convicted of the offence of "false accusation" in Portugal also face up to eight years in prison. In addition, Portugal's criminal code also provides that defamation and/or insult committed against a public official carries a harsher punishment than the same act committed against a private person. These provisions on criminalization of defamation and insult are amidst the ones that most seriously contradict with the principles established by international standards. For more information see Defamation and Insult Laws in the OSCE Region: A comparative study.

Notes on the national implementation of the preliminary ruling by the referring court

Not applicable.

Impact on national case law from the same Member State or other Member States

Not applicable.

Connected national caselaw / templates

Not applicable.

(Link to) full text

<https://www.bailii.org/eu/cases/ECHR/2019/705.html>
